Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DONNA SAXONIS,

PETITIONER(S)

V.

LYNN TEACHERS UNION LOCAL 1037, ET AL.,

RESPONDENT(S)

ON PEITION FOR WRIT OF CERTIORARI TO THE
APPEALS COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

LESTER E. RIORDAN III
COUNSEL OF RECORD
12 POND LANE,
SUITE EB-1N
CONCORD, MA 01742
BBO# 633725
1-978-341-0404

QUESTIONS PRESENTED

A public school substitute teacher on a long term assignment qualified for the protections and benefits of a collective bargaining agreement (CBA). The teacher was discharged without cause and almost immediately rehired for the purpose of impairing her ability to accrue seniority rights. The union did not disclose the grievance, failed to advise the teacher of her options and declined to present the grievance. A state appeals court held that the teacher was entitled to a trial against the school for reliance damages, but prohibited her from pursuing her claim against the union. In such circumstances:

1. Can a state court prohibit a jury trial against a union, in derogation of the 7th and 14th amendments of the Constitution, where it finds a justiciable claim against the employer and where the union took no steps to advise or represent the teacher and claimed that it did not owe a duty of fair representation despite the teacher's status as a member of the collective bargaining unit?
2. Does an appellate court judgment violate the 5,th 7th and 14th amendments of the Constitution, where it holds that a claim for breach of the duty of fair representation (a) is barred by the statute of limitations; and (b) is barred on the finding that the teacher will be unable to establish bad faith; where the issues were not presented to the trial court; there are facts in dispute; the court has ruled that the claim is, in part, justiciable and the plaintiffs were not provided with adequate notice of the need to present evidence on the issue.
3. Can a union representing public school teachers, in derogation of the 5th and 14th amendments of the Constitution, deprive a substitute teacher of meaningful access to the grievance process where the duty of fair representation is guaranteed by state statute and treated by the highest court of the state as a right to due process and/or equal protection under the U.S. Constitution?
4. Does a public school deprive a non-tenured teacher of a vested property interest, in derogation of the 5th and 14th amendments of the Constitution, where it discharges her contrary to an express agreement and the terms of the CBA?

LIST OF PARTIES

PLAINTIFFS

Donna Saxonis*
Paul Saxonis*

DEFENDANTS

The City Of Lynn
Patrick J. McManus, Mayor
Lynn Public Schools
Dr. James Mazareas
Dr. James T. Leonard
Edward B. Johns
Patricia M. Libby,
Bartley J. Conlon
Albert G. Malagrifa
Evelyn G. Lazaris *
Lorraine A. Lebrun*
Joseph O'Hagan
Joseph G. Gauvain
The Lynn Teachers Union Local 1037
American Federation of Teachers
AFL-CIO
The Lynn School Committee Members:
Judith A. Flanagan Kennedy
Frank M. Carrabba
Stephen J. Duffy
William F. McGuthness
George K. Mazareas
William M. McDonald
Timothy McManus
Patricia M. Capano
Donna M. Coppola
Madelyn Day Barry
Loretta Cuffe-O'Donnell
Carolyn A. Murray
*Non-parties. All other individuals are parties due to their representative capacity with the exception of Defendant Malagrifa

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OPINIONS BELOW

On May 20, 2002, the Superior Court, Essex County, Massachusetts, entered Summary Judgment in favor of the Union Defendants. The docket entry is reprinted in the Appendix at AP. 1. The Memorandum of Decision is unreported and reprinted in the Appendix at AP. 2. The Superior Court denied Plaintiffs' motion for reconsideration. This order is unreported and reprinted in the Appendix at AP. 19-20.

On June 12, 2002, On May 20, 2002, the Superior Court, Essex County, Massachusetts, entered Summary Judgment in favor of the remaining Defendants. The docket entry is reprinted in the Appendix at AP. 8, 21. The Memorandum of Decision is unreported and reprinted in the Appendix at AP. 9.

The opinion of the Massachusetts Appeals Court, reported at 62 Mass. App. Ct. 916; 817 N.E. 2d 793 (2004), is reprinted in the Appendix at AP. 23.

The Massachusetts Supreme Judicial Court denied Further Appellate Review. The order, issued without opinion, was reported at 443 Mass. 1104; 822 N.E. 2d 304 (2004), and is reprinted in the Appendix at AP. 29.

JURISDICTION

The Judgment of the Massachusetts Appeals Court was entered on November 8, 2004. A timely petition for Further Appellate Review was filed with the Supreme Judicial Court on November 29, 2004, and was denied on February 2, 2005. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves: Amendments V; VII and XIV of the Constitution of the United States; and Massachusetts General Laws, Chapter 71, §§ 41 and 42; and Chapter 150E, §§ 5 and 10. The pertinent provisions thereof are set forth in full in the Appendix to this petition.

STATEMENT OF THE CASE

The Case in a Nutshell

Donna Saxonis ran her own beauty parlor, but for years she dreamed of being a teacher. When her children grew up and left home, she decided to pursue teaching as a second career. Donna Saxonis went back to school. She earned her teaching certification in cosmetology. She took substitute teaching assignments whenever she could.

In 1996, the vocational institute in her city had a problem. A cosmetology teacher who planned to retire in June of 1997 couldn't return to work due to illness. A day to day substitute would not suffice. The school principal needed a certified long-term substitute teacher to take over immediately. But the principal had another problem. If a long-term substitute stayed for the whole year, that teacher would earn seniority under the collective bargaining agreement. The principal didn't want that.

The department head, at the behest of the principal, contacted Donna Saxonis. She offered her the position. Donna told the department head that if she took the position she would have to close down her business. The department head told Donna that she was in line for the permanent position. The principal reinforced this. In fact, Donna was given paperwork to fill out for the full time position and asked to take a physical.

There was a collective bargaining agreement (CBA) between the school and the teachers' union. Long term substitutes like Donna became members of the collective bargaining unit after twenty consecutive days of service. Donna didn't miss a day. She joined the union. She thought she was on her way. The CBA offers especially important protections to long term substitutes. They receive regular teachers pay and accrue seniority and even tenure just like full-time teachers. They are entitled to due process rights relating to terminations. The CBA protects them in their position over non-bargaining unit members. This is understandable. Not only is the availability of these teachers important to the school, but certified long-term substitutes provide a pool of future teachers.

Donna Saxonis didn't know anything about these things. Donna Saxonis didn't understand the implications of seniority or due process. She never read a collective bargaining agreement. The

union would take care of that. Donna Saxonis didn't even know that the agreement, if properly enforced, would protect her job. The principal wanted her. She was in line for the permanent position. Why should she be concerned?

Donna Saxonis was terminated. The principal, he said, wanted to ensure that he had a chance to observe all qualified candidates for the new position. He wanted to rotate long term substitutes into the position every thirty days. He understood that Donna Saxonis was promised the position for the rest of the year. He knew that she had closed down her business. It was a minor set back. There was no need to worry. Donna was in line for the position.

A day to day substitute teacher without any experience was given the job. She was not certified. She was not a member of the bargaining unit. The Appeals Court even conceded the obvious by nothing that the "placement of an unlicensed and uncertified teacher as a long term substitute was likely improper."

The new substitute was discharged. The principal asked Donna to come back for the rest of the school year. The rotation system died after a short life.

Donna Saxonis did not understand that her earlier discharge made it impossible for her to earn seniority status. But the principal knew it and so did the union. They had a meeting about it, in fact. At the end of that meeting, the union and principal agreed that long-term substitutes will not be removed to prevent an employee from achieving seniority or other benefit status. AP.113.

The union knew that Donna Saxonis was improperly removed and that her seniority was impaired. The union did not inform her of the grievance. They did not advise her. They did not investigate.

The original teacher, on sick leave since December 1996, made an unexpected recovery. She returned on May 12, 1997. Donna Saxonis' last day at work was May 9, 1997. It is undisputed that if Mrs. Saxonis had not been improperly removed earlier, she would have achieved seniority status.

Donna Saxonis did not get the job. In August 1997, she and her husband met with the union president. They spoke with him at length and gave him a letter recounting all the facts. The union president said nothing about the impropriety of the earlier discharge. He said noting about the seniority issue. He offered no advice. He

said there was nothing he could do. During the litigation, the union took the position that it did not owe Donna Saxonis a duty because she was a substitute. Later, the union claimed that it had no duty because, at the time of this meeting, Donna Saxonis was no longer a member of the collective bargaining unit.

Donna Saxonis attempted to contact the members of the school committee to discuss this matter to no avail. She attempted to contact the principal without success. She met for an hour with the school superintendent. The superintendent does not recall the meeting.

Donna Saxonis testified to these facts. However, she was not alone. Her department head verified Donna's allegations by affidavit.

The Details

The Lynn Teachers Union Local 1037 is the collective bargaining representative for public school teachers serving in the city of Lynn, Massachusetts, including teachers at the Lynn Vocational Technical Institute (hereinafter ("LVTI"). This suit was filed in the Massachusetts Superior Court for Essex County by Donna and Paul Saxonis, against the respondent Joseph G. Gauvain as the representative officer of the union.[1] The City of Lynn or the Lynn school system refers to the remaining defendants.

The complaint, drafted *pro se,* stated a variety of claims.[2] This petition limits its focus to Counts I through III.[3] Paul Saxonis continued to litigate the matter pro se though discovery. He did not seek written discovery but conducted a number of depositions. Mr.

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[1] At the time the suit was filed, Joseph G. Gauvain was president of Local 1037. The national unions were also named as parties.

[2] Paul Saxonis drafted the complaint and conducted the litigation for his wife. Most of the individual defendants were sued in their representative capacity. With the exception of the unions, the City of Lynn and Defendant Malagrifa, defendants named in their individual capacity are no longer part of the suit.

[3] Count III states a claim for conspiracy. The only direct evidence relates to the letter documenting a meeting between these parties where the issue of termination of substitutes to impair seniority rights was raised. While petitioners do not expressly waive this issue, argument is confined to Counts I and II.

Saxonis litigated the union's motion for summary judgment. On the day his opposition to the City of Lynn's motion was due, he procured counsel to assist him. His new counsel procured an additional week to respond to the City's summary judgment motion. The union, which did not agree to a supplement of the opposition to their summary judgment motion, agreed to a continuance of the hearing.

Count I of the complaint states an action captioned as Breach of Employment Contract. AP. 40. This count, which contains 36 separate allegations, expressly pleads both the city and the union. This aspect of the complaint contained different theories of recovery against the two distinct groups of parties. Relative to the union, the complaint expressly alleges the breach of the duty of fair representation. A. 40-46 (Complaint at ¶ 214). The complaint also expressly pled Mrs. Saxonis' status as a union member. Id. at ¶ 205.

While Mr. Saxonis did not cite to constitutional provisions, he expressly pled the violation of constitutional rights. Id. at ¶¶ 29, 190, 220. Central to this claim and also expressly pled, Mr. Saxonis focused a great deal of his complaint based on the denial of due process, AP. 50, 64, 71, 77. Throughout his papers during the course of litigation, Mr. Saxonis continued to expressly raise the issue of a breach of constitutional rights based on lack of due process and the inability to pursue a claim based on the union's breach of its duty of fair representation. AP. 50, 55, 62, 64, 696, 71, 77, 78. These papers, while in-artfully pled, highlight Mr. Saxonis' focus on the constitutional implications of the case.

Count II of the complaint states an action captioned as Wrongful/Unlawful Termination. This count, while primarily directed to the City of Lynn, states that the defendants, including the union, took no action to "manage, prevent or correct" the City of Lynn's termination of Donna Saxonis. Id. at ¶ 221 and 225.

A fair reading of these two counts shows that the plaintiffs attempted to state causes of action against the union for breach of the duty of fair representation sounding in both contract and tort. Likewise, these counts expressed both contract and tort theories of recovery against the City of Lynn.

Donna Saxonis, via affidavit, verified her allegations. In addition, Mrs. Saxonis procured an affidavit from her supervisor which corroborates her claims.[4]

The facts, as set forth in the complaint and related materials, indicate as follows: Donna Saxonis is a certified teaching cosmetologist with three decades of experience. See AP. 115 et seq. In pursuit of a second career as a teacher, she went back to school, obtained her certification and began extensive service as a substitute teacher in the Lynn School System. See Id. Substitute teaching provides an important and traditional entry into a career position.

In December 1996, after being asked to work as a substitute for Defendant Lazaris on short notice, Donna Saxonis was asked by her department head to take a long-term teaching position at Lynn Vocational Technical Institute (hereinafter ("LVTI"). (Emphasis added.) AP. 115 et seq. The long-term nature of the assignment mandated state certification. AP. 101 et seq. The position resulted from a vacancy created by the departure of Defendant Lazaris. e.g. Id. Ms. Lazaris was placed on indefinite leave. Id.

The City of Lynn expected that Mrs. Saxonis would close down her full-time beauty salon to take this position. A.101, 115. The department head, Ms. Jacqueline Whyte, indicated that it was clear from her offer that Ms. Saxonis could not accept the position without closing her full-time salon. Id. Ms. Whyte added that, "Malagrifa was aware that Donna was closing her business and that it would be impossible for her to accept the position and still maintain the business." Id.[5] "[E]ach and every action [she] took relative to the hiring, dismissal and rehiring of Donna Saxonis... was approved by or ordered by Defendant Malagrifa." Id.

Ms. Whyte specifically told Donna Saxonis that the position was for the remainder of the school year and as a long-term

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[4] The supervisor's facsimile affidavit was submitted on the day of the hearing with additional factual exhibits. The original signature was filed a week later. Mr. Saxonis also submitted additional exhibits at hearing. The trial court did not expressly admit or strike these papers. However, the court's memorandum on summary judgment cites to some of these papers. See A. 3 referring to the CBA.

[5] Ms. Whyte's affidavit is consistent with and supportive of Donna Saxonis' affidavit. Compare AP. 101 with AP. 115.

substitute. Id., AP.101. Defendant Malagrifa approved this offer. Id. As to long-term status, Ms. Whyte stated that she issued to Mrs. Saxonis a "teacher's day planner and attendance book." Id. Ms. Whyte added that "[t]he planner is issued only to long-term employees..." and that she was "unaware of any situation where a day to day substitute was issued a planner." Id.

The City of Lynn acknowledged that Donna Saxonis alleged that she was "hired to serve as a substitute teacher for Defendant Lazaris for the remainder of the academic school year." In addition to Ms. Whyte's testimony, Mrs. Saxonis affirmed this allegation, based on personal knowledge, via her affidavit. A. 115.

Donna Saxonis continued in her assignment without incident or interruption until February 14, 1997. Id. Three weeks short of earning her seniority rights, Donna Saxonis was summarily terminated and replaced by Ms. Ann Fountain. Id. The termination occurred without advance written notice as required by the Collective Bargaining Agreement.

Ms. Fountain, a high school graduate, was uncertified and unqualified to take the position. Defendant Malagrifa asserted that he was instituting a thirty (30) day rotation system to assess candidates to fill Defendant Lazaris' position for the coming school year. Id. Ms. Fountain's hiring supports the allegation that the rotation system constituted a mere pre-text to impair Donna Saxonis' seniority. Clearly, Ms. Fountain was not eligible for the full-time position based upon her credentials. Id. and at 101 et seq. Further, Defendant Malagrifa was aware that Ms. Fountain was not qualified. The rotation system was abandoned after Ms. Fountain's departure. Id.

Donna Saxonis was rehired. Id. Mrs. Saxonis was assured that this time the position was "until the end of the year." Id. In fact, Mrs. Saxonis was hired as a long-term substitute on the first day of her return. Id. Mrs. Saxonis remained in the position until May 9, 1997, at which time she was again summarily dismissed, once again without notice. Id.

There is no dispute, and the trial court implicitly found, that Donna Saxonis served as a substitute teacher for at least thirty-seven consecutive school days. See AP. 83-85. As a result, Donna Saxonis became a "substitute teacher on a long-term assignment," within the meaning of the Collective Bargaining Agreement (hereinafter

"Contract"), on either December 5, 1996, or January 15, 1997. See Id.

After Mrs. Saxonis filed her lawsuit, Malagrifa concocted a pre-textual claim that Ms. Fountain left under duress that was caused by Donna Saxonis' alleged harassment. The Defendants have not provided a shred of credible evidence to establish this outrageous and malicious claim. This contention is directly rebutted by Ms. Whyte's affidavit which states that not only was she completely unaware of this allegation, but that Malagrifa would not have re-hired Donna Saxonis had she engaged in such conduct. A. 101.

When Malagrifa was asked at his deposition why he rehired Mrs. Saxonis he simply responded, "Do you discipline your child for being a bad kid and then praise them the next day for being a good kid?" As to Ms. Fountain, it is of some interest and quite curious that the only document available in her file is a payroll card. There are no applications on file, no certifications or resumes, no employment physical.

The allegation that Malagrifa engineered the destruction of Donna Saxonis' seniority in this manner is not merely documented by Ms. Whyte's affidavit, but was actually memorialized by the Union. See discussion *infra*. The Union concealed this from Mrs. Saxonis until Mr. St. Pierre, a union official, disclosed the information in January 1998. A meeting occurred between Union officials and Defendant Malagrifa regarding an unidentified grievance on April 30, 1997. AP.113. This meeting, memorialized in a letter from Gauvain to Malagrifa, May 1, 1997, states: "Long-term substitutes will not be removed from their assignments to solely reduce the cost to the system. Nor will they be removed to prevent an employee from achieving seniority or other benefit status." Id.

In addition, Donna Saxonis was led to believe that she had received a conditional offer of employment. A. 115. The school went so far as to process the paperwork. Id. Malagrifa, while encouraging Mrs. Saxonis all the more, continuously enjoyed asking her if the job had been posted yet. Id.

All of this came to a head in August 1997, when Malagrifa and Lazaris invited Mrs. Saxonis to a "meeting." See AP. 115. That "meeting" was an "interview." Id. During the "interview", Malagrifa and Lazaris claimed that Mrs. Saxonis took school funds, harassed Fountain and was too old for the position. Id. Malagrifa and Lazaris abused Mrs. Saxonis' personal file, including medical

records. Id. Mrs. Saxonis, was subjected to ridicule, felt intimidated, and became upset and traumatized as the meeting progressed. Id. She felt that she could not leave the room. Id. Later, she reported this to Gauvain. Id. Gauvain took no action.

In August 1997, Mrs. Saxonis learned that Defendant LeBrun was hired to replace Defendant Lazaris. Id. Regarding Ms. LeBrun, there is a plethora of evidence indicating that she was unqualified for the position. The evidence reasonably supports the inference that Lynn School officials knew or should have known of her lack of qualifications. Id. There is sufficient evidence to suggest that once this evidence was brought to their attention, Lynn School officials covered-up this inequity.

LeBrun was questioned extensively regarding these issues with particular emphasis on her lack of qualifications. She can remember very little. In fact, when questioned regarding her work history, she stated she did not recall or did not know over 200 times. *Dep. not incl.* In any event, Defendants Malagrifa and Dr. Leonard appointed LeBrun to the teaching position prior to the date of her application.

On learning of this hiring, Donna Saxonis sought the Union's assistance. AP. 114. She was extremely upset and only spoke to Defendant Gauvain briefly. Id. The Union, knowing full well that her seniority had been improperly impaired, indicated that they could not help her because she did not have sufficient seniority rights. AP. 126.

Subsequent to this conversation, Mrs. Saxonis provided Gauvain with a letter transmitting notes regarding her employment situation. AP. 115. Although Gauvain acknowledges the meeting, he indicated that he does not recall ever receiving the document. He further states that Mrs. Saxonis never asked him to file a grievance. Id. at 126, 115. Despite the plain text of the Collective Bargaining Agreement, he adds that the Union has no written position regarding the replacement of bargaining unit members without notice and by less qualified individuals. See AP. 87.

Gauvain conceded that he did nothing on behalf of Mrs. Saxonis. E.g. AP. 126.He did not assist her in filing a grievance or inform her of her rights. Id. He did not reveal to Mrs. Saxonis any concerns regarding Malagrifa's intentional impairment of her seniority rights. Id. In fact, he plainly states that he had no duty to represent a long-term substitute at all. Gauvain, in his deposition

some four years later, stated that he does not know if Mrs. Saxonis was ever a long-term substitute.

Mrs. Saxonis unknowingly instituted a grievance procedure by raising these issues with the school superintendent. Defendant Leonard (and his successor), in derogation of the requirements of the Contract, refused to issue a written decision. However, both the school and the Union take the position that Donna Saxonis is not entitled to the benefits of the CBA and, therefore, may not avail herself of the grievance process.

While indicating at his deposition that he would aggressively investigate complaints relating to such abuses, Defendant Leonard cannot even recall his hour-long meeting with Mrs. Saxonis. He did apologize for his inability to recall this meeting. Faced with no other procedural options and after providing requisite notice to the City of Lynn, Mrs. Saxonis filed suit. Initially and unsuccessfully, they attempted to find an attorney. Much of the case went forward *pro se*.

The Union's motion did not address Donna Saxonis' express claim regarding the breach of the duty of fair representation. See AP. 45 (Complaint at ¶ 214). The thrust of the Union's motion that it was not a party to the contract – an obvious reflection of their initial position that Donna Saxonis was not a member of the collective bargaining unit. AP. 126. The union did not raise the statute of limitations at all. Id. The union revised its position to claim that it could not be liable where Donna Saxonis was no longer a bargaining unit member at the time it learned of the grievance. Id. and 3. The City's motion focused squarely on its legal position that Mass. Gen. L. ch. 71, §§ 41 and 42 allowed the City to discharge at-will regardless of its own agreements or the provisions of the CBA.

This case came before the Massachusetts Court of Appeals following a grant of Summary Judgment, Kern, J., in her orders of May 20, 2002, and June 12, 2002.

The May 20, 2002, Order granted Summary Judgment to the Defendants Lynn Teachers Union Local 1037, American Federation of Teachers, AFL-CIO (hereinafter "Union"). The Superior Court held that Union had no obligation to Donna Saxonis since her grievance arose subsequent to her termination. Thus, the Superior Court avoided directly addressing the claim. The Superior Court denied Plaintiff's Motion for Reconsideration, indicating that the motion raised "nothing new."

The order of June 12, 2002, granted Summary Judgment to all other Defendants. The Court held that at-will employment permitted the City of Lynn to summarily discharge Donna Saxonis.

The Appeals Court granted Donna Saxonis partial relief against the City of Lynn, but limited her claim to unpaid wages and reliance damages. AP. 23. In one troubling aspect of the decision, the Appeals Court stated that Count II must be dismissed because she has cited no authority, either in case law, statue or the collective bargaining agreement establishing a viable public policy. AP. 25. This simply ignores the record. In fact, the trial court acknowledged Donna Saxonis' claim that the City violated express protections contained within the CBA, but ruled in the City's favor because it viewed Donna Saxonis as an employee at will.

Relative to the Union, the Appeals Court held that Mrs. Saxonis could not pursue claims for breach of the duty of fair representation occurring between December 1996 and May, 1997 because the claims were untimely. The Union did not seek summary judgment on the basis of the statue of limitations. AP. 126. In fact, the Union did not explicitly seek summary judgment on the breach of the duty of fair representation. The union consistently took the position that it did not owe Mrs. Saxonis a duty and acknowledged that it did not inform her of her grievance. In addition, there are significant facts supporting application of the discovery rule. These claims were never argued in the trial court.[6]

The Supreme Judicial Court denied Donna Saxonis' application for further appellate review on February 2, 2005.

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[6] The only limitations argument related to the City of Lynn. The trial court did not rule in the City's favor on this issue.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I.

ARGUMENT RELATIVE TO THE UNION

This case is not about equating the duty of fair representation with a constitutional right. It is about the failure of process: The denial of meaningful access to the grievance process or arbitration. The denial of the right to vindicate a claim for breach of the duty of fair representation on the merits and before a jury.

As this Court recognized, the duty of fair representation is a statutory right with constitutional *implications.* Vaca v. Sipes, 386 U.S. 171, 182 (1976) and Steele v. Louisville N.R.R., 323 U.S. 192, 198-199 (1944). Those constitutional implications raise the specter of due process and equal protection guarantees.

Massachusetts enacted a statutory duty of fair representation applicable to unions representing public employees. Mass. Gen. L. ch. 150E, §§ 5 and 10. The refusal to participate in good faith in mediation, fact finding and arbitration procedures constitutes a prohibited practice under the statute. Id. at §10(b)(3). Further, the Massachusetts Supreme Judicial Court stated that even if the Massachusetts statutes "did not provide for the duty of fair representation, the courts would infer it as a constitutional requirement." Leahy v. Local 1526, American Federation of State, County and Municipal Employees et al., 399 Mass. 341, 348 (1987). Thus, at the very minimum, a breach of the duty of fair representation impairs an employee's access to meaningful due process.

The due process concern regarding the breach of the duty of fair representation is heightened here because the Appeals Court held that Donna Saxonis was entitled to pursue at least part of her claim against the school system. Thus, the Appeals Court concluded that the grievance at issue was justiciable.

In fact, the Appeals Court's dismissal of the fair representation claim is on a completely different *factual* ground than the trial court's decision – and herein lies the due process concern. The complete text of the Appeals Court decision on this issue, as set forth in paragraph four of the opinion, states as follows:

> Saxonis's claim that the union breached the duty of fair representation in refusing to pursue her complaint of not being named Lazaris's successor fails (even if she was a member of the bargaining unit) because she has demonstrated no reasonable expectation of proving that the union's conduct was "arbitrary, discriminatory, or in bad faith" or "perfunctory or demonstrative of inexcusable neglect," Graham v. Quincy Food Service Employees Ass'n, 407 Mass. 601, 606, 555 N.E.2d 543 (1990) (citations omitted), as contrasted with a reasonable, good faith assessment that her grievances lacked merit. See id. at 609. See also Cappellano v. Massachusetts Bay Transp. Auth., 38 Mass. App. Ct. 231, 235, 646 N.E.2d 769 (1995). Cf. National Ass'n of Gov't Employees v. Labor Relations Comm'n., 38 Mass. App. Ct. 611, 613, 650 N.E.2d 101 (1995), in which the plaintiff was simply ignored. Saxonis's other allegations against the union are untimely and conclusory.

It is significant that the trial court did not hold that Donna Saxonis' claims against the union based on the duty of fair representation (Count I) were barred by the statute of limitations. AP. 2 et seq. The union, in fact, never raised the issue. AP. 126. Under Massachusetts law, the statute of limitations on a court action for breach of the duty of fair representation is three years. Graham v. Quincy Food Service Employees Ass'n, 407 Mass. 601, 612-614 (1990). Further, the limitations period does not begin to run until discovery of the action. See e.g. Mass. Gen. L. ch. 260, § 12. In fact, the case law suggests that the limitations period is tolled relative to actions for breach of the duty of fair representation until the union affirmatively repudiates its duty. Graham at 614, n.11. How then, under basic notions of due process, could the Appeals Court sit *de novo* on the limitations issue when the complete facts on this issue were not before the trial court. No court should issue summary judgment sua sponte without notice to the parties to bring forth evidence. Celotex v. Catrett, 477 U.S. 317, 326 (1986). This implicates the V and XIV amendments.

Further, the union did not seek summary judgment on the basis of the breach of the duty of fair representation. At the trial

level, the union initially took the position that it owed no duty to Donna Saxonis because she was a substitute teacher. AP. 126.

The trial court agreed with the union. The trial judge stated that Donna Saxonis was precluded from taking her action against the union to trial because, at the time she raised the complaint with the union, she was no longer employed. AP. 3. In other words, once Donna Saxonis was discharged, she lost access to the grievance and arbitration procedures to address her wrongful discharge and the accompanying loss of benefits under the collective bargaining agreement. The trial court justified this position by reasoning that since Donna Saxonis was no longer employed, she lost her status as a member of the collective bargaining unit. Therefore, the trial court concluded, the union no longer had a duty to represent her.

It did not matter that Mrs. Saxonis was a member of the bargaining unit when the grievance occurred. It did not matter that the union knew of the grievance at that time, but failed to disclose the existence of the grievance to Mrs. Saxonis. It did not matter that the employer's violation of the CBA permanently impaired access to *future* employment benefits. The trial court's position is untenable and was properly rejected by the Appeals Court. However, the Appeals Court was not entitled to simply substitute its judgment on the facts.

The Seventh Amendment of the United States Constitution provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to jury trial shall be preserved. . . ." U.S. CONST., amend. VII. This Court has held that the Seventh Amendment entitled employees to a jury trial relative to their claim of a breach of the duty of fair representation. The Court's focus in the Terry decision was whether an action based on fair representation was more of an equitable claim than a legal action. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 573 (1990).

The Seventh Amendment has never been interpreted in such a rigid manner to preclude the application of procedural devices for the just administration of cases. This Court, almost a century ago, held that summary judgment does not of itself violate the Seventh Amendment. Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320 (1902).

However, Fidelity & Deposit Co. does not insulate summary judgment from constitutional scrutiny. Just the opposite. The case stands for the proposition that once the issue is made, the right of trial by jury accrues. Fidelity & Deposit Co. at 320.

"Summary judgment, applied properly, does not violate the Seventh Amendment." City of Chanute, Kansas v. Williams Natural Gas Co., 955 F.2d 641, 657 (10th Cir. 1992). Applied improperly, it violates a significant and certain constitutional right. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (reversing summary judgment on Seventh Amendment grounds and holding that collateral estoppel precluded a new action).

Here, the appellate court sat de novo on issues not properly presented to the trial court. On the statute of limitations issues, for instance, this poses a significant problem because the role of the discovery rule and the equitable tolling of the limitation period is both factually sensitive and central to the case.

As discussed, the union also failed to seek summary judgment on the issue of fair representation. The factual assumption that the union did not act in bad faith based on their failure to disclose abuses to Mrs. Saxonis is questionable. The existence of documentary evidence establishing their knowledge of a practice to impair seniority rights should have precluded summary judgment.

In Massachusetts, in order to establish a breach of the duty of fair representation, the Plaintiff must show that a union's actions towards an employee were arbitrary, discriminatory or in bad faith. Graham at 606 (1990). In order to defeat summary judgment, the plaintiff must show that her grievance is "*arguably* meritorious," and provide some evidence that the union acted in bad faith. Graham at 607, 609.

Proof of a grievance's merit, however, is circumstantial evidence that the failure to process the claim constituted bad faith. Harrison v. United Transportation Union, 530 F.2d 558, 561 (4th Cir. 1975). Trial courts instinctively know that issues of good faith – central to the duty of fair representation - rarely are amenable to summary judgment. See e.g., Dewey v. Clark, 180 F.2d 766 (1950).

Further, a union breaches its duty to an employee where its refusal to pursue a grievance or complaint is perfunctory or demonstrative of inexcusable neglect. Id. For instance, a union's failure to investigate constitutes breach of the duty of fair representation. Soto Segarra v. Sea-Land Service, Inc., 581 F.2d 291

(1st Cir. 1978) (finding breach of duty of fair representation in union's failure to respond to employee's repeated requests that the union investigate and process his discharge grievance); De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281 (1st Cir.) (1970) (breach of duty of fair representation in union's failure to discern an obvious basis under the contract for pressing claims).

The "lack of a rational basis for a union decision, and egregious unfairness or reckless omissions or disregard for an individual employee's rights may have that effect." Id. Further, when discrimination is involved, a union's alleged good faith will not suffice to insulate it from the process of law. See Baker v. Local 2977, State Council 93, American Federation of State, County and Municipal Employees et al., 25 Mass.App.Ct. 439, 442 n.14 (1987) *citing* Carbone v. School Comm. of Medford, 12 Mass.App.Ct. 948 (1981).

In the Harrison case, a memorandum memorialized facts suggesting an agreement between a union and employer that a grievance would not be pursued in exchange for the resolution of a grievance of another employee. Harrison v. United Transportation Union, 530 F.2d 558, 561(4th Cir. 1975). The first circuit indicated that a jury could conclude that the grievance was "arbitrarily relinquished" in violation of the duty of fair representation. Id. In fact, Harrison went further by condemning the concealment of this arrangement from the employee. Id.

Harrison is clearly on point. A conscious decision not to notify the employee of both her grievance and the union's decision not to pursue it constituted "arbitrary action." Id. The court indicated that since the employee was a union member, concealment violated the union's constitution and by-laws and therefore constituted a breach of contract as well. Id. at 561.

Donna Saxonis, like the employee in the Harrison case, was a union member. The Harrison Court expressly held that the decision of the union to "withhold information" violated the duty of fair representation. Id. Succinctly put, if the employee's loss results from the deliberately misleading conduct of the union, the union is then held accountable. Further, if a conspiracy is alleged and established at trial, both the union and the employer may be liable for the breach of the duty of fair representation in addition to the contract claims. Id. at 561, 563.

At the outset of this argument it was noted that this Court recognized the duty of fair representation is a statutory right with constitutional *implications.* Vaca v. Sipes, 386 U.S. 171, 182 (1976) and Steele v. Louisville N.R.R., 323 U.S. 192, 198-199 (1944). The central point is articulated in Steele. Because of the importance of rights given up by employees in the collective bargaining process, constitutional protections are implicated without the duty of fair representation.

The inference of a constitutional requirement as discussed in Leahy, however, is expressed through a statutory scheme which provides employees a cause of action to vindicate the right. See Leahy v. Local 1526, American Federation of State, County and Municipal Employees et al., 399 Mass. 347-348 (1987).

As such, it is not easy to fit a constitutional protection relative to government action against a private or a quasi private party without the statutory enforcement device. What this Court meant in Steele was that certain constitutional problems arise when a legislature requires individuals to give up rights in favor of that statutory scheme. The way this Court resolved the problem was by acknowledgement that a statutory device to vindicate those rights must have sufficient weight. As such, due process is implicated when courts fail to provide an employee the opportunity to vindicate the right implicit in the duty of fair representation. In this sense, it is possible to see the V and XIV amendment implications by looking at the issue from the point of view of the employee vis a vis a court. If a court acts to insulate the union beyond the scope of their privilege, then the court has acted to limit an important right without process of law.

In any event, the effect of the union's initial position, in practice, cast Donna Saxonis outside the collective bargaining agreement structure. That position effectively denied her the right to grieve the matter or to seek arbitration. Had the union made that process meaningfully accessible to her, then she would not only have understood her legal options, but she would have been restored to benefits that the Appeals Court has allowed her to continue to pursue. But as the union has said – notwithstanding the collective bargaining agreement –Donna Saxonis was only a substitute.

II.

ARGUMENT RELATIVE TO THE CITY OF LYNN, MASSACHUSETTS AND ITS SCHOOL SYSTEM

Donna Saxonis established a right to continued employment under both the CBA and via an express agreement to employ her through the end of the school year. To the extent that Donna Saxonis' employment constituted a property interest, she was entitled to due process notice and a hearing before she could be discharged. Const. amends. V and XIV; Miline v. School Committee of Manchester, 381 Mass. 581, 583 (1980).

The existence of a constitutionally protected property interest depends on the nature of [Mrs. Saxonis'] interest under [Massachusetts] law." Miline at 583 *citing* Bishop v. Wood, 426 U.S. 341, 344 (1976). Under Massachusetts law, a teacher need not be tenured to have a property interest in her job if she can demonstrate a statutory or contractual right. Miline at 583.

For instance, in Miline v. School Committee of Manchester, due process was not implicated where the teacher could not demonstrate a right to continued employment under the CBA. Miline v. School Committee of Manchester, 381 Mass. 581, 582 n.2, and 583 (1980). In addition, due process is mandated where a teacher establishes that the reason for dismissal was fabricated or pre-textual; that the action was arbitrary or unreasonable or that a teacher's rights in relation to other teachers, tenured or non-tenured, were denied. Id. at 582, 583, n.4.

In Massachusetts, long term substitutes – unlike daily substitutes – are "given the same assignment 'for a predetermined period of time' which 'in many cases may be for the entire school year.' " Brophy v. School Committee of Worcester, 6 Mass.App.Ct. 731, 734 (1978). Long term substitutes are defined as teachers under the applicable CBA and are expressly included in the collective bargaining unit. AP. 83-86. The CBA formalizes long-term substitute status upon twenty days consecutive days of service. AP. 84-86. Under Massachusetts law, regular and continuous service by a long term substitute is counted for purpose of accruing seniority and tenure. Brophy at 537.

The CBA specifically mandates that members of the bargaining unit have preference and shall be kept in position. AP. 87. This provision is consistent with Massachusetts case law. On point, the Jackson case, citing to Carnig v. Carr, 167 Mass. 544 (1987), indicates that "[w]here an employee has left his own business at the employer's urging, to accept proffered permanent employment with the employer, the employee does not hold this position at the pleasure of the employer. Instead, the employer is obliged to retain the employee so long as the employer has work available and the employee performs it satisfactorily." Jackson v. Action for Boston Community Development, Inc., 403 Mass. 8, 11-12 *citing* Carnig v. Carr.

The facts lay out a fact pattern where a substitute teacher, hoping for a full time position, was taken advantage of by a school principal. As a result, she was subject to his whim and caprice. School principals are not vested with the right to breach a CBA or take advantage of their employees. The placement of a person without any experience at the helm of a technical curriculum is not sound policy. Had the union and the school abided by their agreements, it would not have happened. Donna Saxonis asks for a jury trial as a matter of constitutional privilege.

CONCLUSION

Donna Saxonis requests that this Honorable Court grant her request for a writ of certiorari to review the decision of the Appeals Court of Massachusetts.

Respectfully Submitted,

Lester E. Riordan III
Law Office of Lester E. Riordan III
12 Pond Lane, EB-1N
Concord, Mass. 01742
Telephone (978) 341-0404